In the Supreme Court of the United States.

OCTOBER TERM, 1903.

C. E. WYNN-JOHNSON, PLAINTIFF IN ERROR,
v.
JAMES M. SHOUP, UNITED STATES MARSHAL for the district of Alaska. } No. 266.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF ON BEHALF OF THE UNITED STATES.

This case is brought here upon a writ of error to the United States district court for the district of Alaska, first division, for the purpose of reviewing a final order of that court refusing to discharge the petitioner from the custody of the United States marshal after a hearing upon a writ of *habeas corpus*.

STATEMENT OF FACTS.

On the 10th day of December, 1900, an indictment was found in the district court for the district of Alaska, division No. 1, against C. E. Wynn-Johnson and Moore's Wharf Company, a corporation of Skagway, Alaska, of which company said Johnson was at that time the general manager. The indictment charges them with

the offense of unlawfully carrying on and conducting the business of a public wharf at the city of Skagway, Alaska, without having first applied for and obtained a license so to do from the United States district court in and for the district of Alaska, division No. 1, as required by sections 460 and 461 of the Alaska Code of Criminal Procedure. (Record, p. 3.)

It appears from the record that on the 12th day of March, 1901, C. E. Wynn-Johnson, the petitioner herein, entered into a recognizance in the sum of $200, for his appearance before said court to answer to said indictment. (Record, p. 5.) Thereafter, to wit, on the 29th day of October, 1901, H. B. Runnels and E. J. Shaw, the sureties on the bond of said petitioner, surrendered to James M. Shoup, United States marshal for the district of Alaska, and placed in his custody said petitioner, and directed him, said marshal, to keep him in custody in order to release said sureties from all liability by reason of their said undertaking. (Record, pp. 6 and 7.)

On the same day, to wit, the 29th day of October, 1901, while the petitioner was in the custody of said marshal, a petition was presented to Hon. Melville C. Brown, judge of the United States district court for the district of Alaska, for a writ of *habeas corpus*. (Record, p. 1.) The petition for said writ of *habeas corpus* alleges that said C. E. Wynn-Johnson is unlawfully imprisoned, detained, and deprived of his liberty by James M. Shoup, United States marshal for the district of Alaska, division No. 1, under and by virtue of a warrant issued out

of and under the seal of said court; that such warrant of arrest was based upon an indictment found by the United States grand jury at Skagway, Alaska, wherein the said petitioner was charged with unlawfully carrying on the business of a public wharf without first having obtained a license so to do. The petition further alleges that the law under which said indictment was found, which resulted in the arrest of said petitioner, is unconstitutional and void. Wherefore petitioner prayed that he may be discharged from the custody of said marshal and restored to his liberty. (Record, pp. 1 and 2.)

On the same day the marshal made and filed a return to said writ of *habeas corpus* (Record, p. 5), and the case was thereupon submitted to Judge Brown for his decision, the only question presented being as to whether section 460 of the Alaska Penal Code, imposing license fees upon certain lines of trade and business therein specified, was constitutional, the claim of counsel for petitioner being that such law imposed a tax in violation of the first clause of section 8 of article 1 of the Federal Constitution, in that the tax was not uniform throughout the United States.

On the 20th day of June, 1902, an opinion was rendered by the court, wherein the constitutionality of the law was sustained. Whereupon the court refused to discharge said Johnson from custody, and made an order remanding him to the custody of the United States marshal to be held for trial upon the indictment. (Record, pp. 8, 9, 10, and 11.)

Thereafter, to wit, on the 19th day of January, 1903, a petition for a *writ of error* having been presented to the court, an order was made that a *writ of error* be allowed as prayed for. (Record, pp. 18 and 19.)

QUESTIONS OF LAW.

I.

It is suggested, in behalf of the Government, that this writ of error should be dismissed for the reason that it appears from the record that the habeas corpus proceeding in the court below was had before the United States district judge of Alaska sitting as a judge and not as a court.

II.

The other question of law presented by this appeal is the constitutionality of section 460, of Title II, of the act of Congress of March 3, 1899 (30 Stat., 1253, 1336), as amended by the act of June 6, 1900 (31 Stat., 321, 330), imposing license fees for prosecuting certain specified lines of business and trade in the Territory of Alaska.

I.

As bearing upon the suggestion that this writ of error should be dismissed for the reason that the *habeas corpus* proceedings in the court below were had before the United States district judge of the Territory of Alaska *sitting as a judge* and not *as a court*, we respectfully direct the court's attention to the following facts:

The petition for the writ of *habeas corpus* in the case at bar is addressed "*To Honorable Melville C. Brown, Judge of the United States District Court for the District of Alaska, Division No. 1.*" (Record, p. 1.) The order directing that the *habeas corpus* issue, commands the United States marshal for the district of Alaska to pro-

duce the body of the said C. E. Wynn-Johnson *before M. C. Brown, the judge of said court*, in the court room of said court at Skagway, in said district, on the 29th day of October, 1901, etc. (Record, pp. 2 and 3.) The writ of *habeas corpus* issued under and pursuant to said order, commands the United States marshal to have the body of the said C. E. Wynn-Johnson, by said marshal imprisoned and detained, together with the time and cause of such imprisonment and detention, "*before Melville C. Brown, judge of the United States district court for the district of Alaska*, division No. 1, at the court room of said court, at Skagway, in said district of Alaska, on the 29th day of October, 1901, at 3.30 o'clock in the afternoon of said day, to do and receive what shall then and there be considered concerning the said C. E. Wynn-Johnson." (Record, p. 4.) The order subsequently made and entered by the Hon. M. C. Brown, judge of said court, remanding the prisoner to the custody of the marshal, recites, it is true, that the cause was submitted to the *court*, and that the *court*, having had the same under consideration, and being duly advised in the premises, denies the relief prayed for in the writ, and refuses to discharge the petitioner from custody. (Record, p. 12.)

But it is suggested, as was said by this court in the case of *Carper* v. *Fitzgerald* (121 U. S., 87), that if the *habeas corpus* proceedings were actually had *before the judge as such*, that the fact that the papers were subsequently filed with the clerk of the court would be ineffectual to change the nature of the proceeding from one before a judge to one before the court.

Mr. Chief Justice Waite, in delivering the opinion of the court in *Carper* v. *Fitzgerald* (*supra*), said:

> From this order the jailer was allowed an appeal to this court by the circuit judge, and the case was docketed here as "an appeal from the circuit court of the United States for the eastern district of Virginia." The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under section 752 of the Revised Statutes, before the judge sitting as a judge, and not as a court. The act of March 3, 1885, c. 353, 23 Stat., 437, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.
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> The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes.

Chapter 57, of the Alaska Code of Civil Procedure (31 Stat., 423), entitled "Of the writ of *habeas corpus*," specifically provides the practice to be followed in securing a review by this court of a final decision of a district court of the Territory of Alaska in a *habeas*

corpus case. That law contains, among other things, the following provision:

> SEC. 608. Any party to a proceeding by habeas corpus, including the United States when the district attorney appears therein, may appeal from the judgment of the district court refusing to allow such writ or any final judgment therein, either in term time or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another or subsequent proceeding of the same kind.

It will thus be seen that an appeal may be taken from the final judgment of *the district court* "in like manner and with like effect as in an action." This would seem to authorize an appeal by writ of error, the practice followed in the case at bar, if taken within one year from the date of the judgment sought to be reviewed. It will be observed that the statute above quoted substantially changes the practice relative to appeals in *habeas corpus* cases from United States district or circuit courts within the States, where the appeal must be taken *within six months* from the date of the final judgment, and must be brought up *by appeal* and not by *writ of error*.

Sections 570 and 571, of the Alaska Code of Civil Procedure,[a] expressly provide that a writ of *habeas corpus* may be issued by and be made returnable before either the *court* or the *judge* of the United States district court for said Territory. It will be observed, however, that section 608, above quoted, makes provision for an appeal "from the judgment of the district *court*," etc. Our suggestion, therefore, is that if the record in the case at bar shows that the proceedings in the court below were had before *the United States district judge* for the district of Alaska and not before *the court as such*, no appeal is authorized by law on the authority of *Carper* v. *Fitzgerald* (*supra*).

McKnight v. *James*, 155 U. S., 685;
Lambert v. *Barrett*, 157 U. S., 697;
Whitten v. *Tomlinson*, 160 U. S., 231–244.

But see also:

In re Palliser, 136 U. S., 257;
Harkrader v. *Wadley*, 172 U. S., 148.

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[a] SEC. 570. The court or judge to whom the petition is presented must allow the writ without delay, unless it appears from the petition itself, or from the documents annexed thereto, that the person for whose relief it is intended is by the provisions of this chapter prohibited from prosecuting the writ. Upon the filing of the petition and the order of allowance with the clerk, the clerk shall issue the writ immediately in accordance therewith.

SEC. 571. The writ shall command the defendant to produce the person imprisoned or restrained, by whatsoever name he may be charged or called, and certify and return therewith the time and cause of his imprisonment or restraint, before the court or judge allowing the writ, at a time and place therein specified, or immediately after the receipt of the writ, to do and receive what shall then and there be considered concerning the person so imprisoned or restrained; or when it appears by the petition and documents thereto annexed that the cause or offense for which the person is imprisoned or restraint is not bailable, the production of the party may be dispensed with, though such production be prayed for in the petition and the writ issued accordingly.

II.

The contention of the Government is that section 460, of Title II, of the act of March 3, 1899, as amended by the act of June 6, 1900, imposing license fees for prosecuting certain lines of business and trade in the Territory of Alaska, is constitutional not by reason of the general power of taxation provided for in Article I, section 8, of the Constitution, but from the plenary power "to make all needful rules and regulations respecting the Territory, or other property belonging to the United States" (Article I, section 3, par. 2), and that the exercise of such power is not subject to the provisions limiting the general power of taxation either as to apportionment or uniformity.

This same question was before this court at the last term in the so-called Alaska license cases, which are reported in 187 U. S., 447, 454, 455, and 466; and is also presented in the case of *Joseph R. Binns* v. *United States*, No. 196, of this present term, submitted to the court without argument on April 6, 1904. Binns was tried and convicted in the district court of Alaska upon the charge of having carried on the business of a transfer company without first having obtained a license so to do, and the case was brought to this court on a writ of error to review such final judgment of conviction.

In view of the fact that, so far as the constitutional question is involved, the two cases are identical, we respectfully submit that portion of the Government's brief in the Binns case, from page 5 to page 31, inclusive, in support of the constitutionality of the law which has again been drawn in question.

Copies of the Government's brief in the case of *Joseph R. Binns* v. *United States*, No. 196, October term, 1903, are herewith submitted for the convenience of the court.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

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